Office - Supreme Court, U.S.
FILED
JUN 5 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1747

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

CLEO F. SHOULTZ,

Petitioner,

v.

MONFORT OF COLORADO, INC., A DELAWARE CORPORATION; KENNETH W. MONFORT, AND SAMUEL D. ADDOMS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRUCE A. MENK
Hall & Evans
717 Seventeenth Street
Suite 2900
Denver, Colorado 80202
(303) 293-3500

GARY B. BLUM
Long & Jaudon, P.C.
1600 Ogden Street
Denver, Colorado 80202
(303) 832-1122

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a complaint concerning requests that a federal meat inspector be removed from his assignment, made by the owners of a meat processing plant to the superiors of a federal meat inspector, states a cause of action under 42 U.S.C. §1985(1) which can penetrate the freedom to petition for redress of grievances guaranteed by the First Amendment.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Introduction	1
Reasons for Not Granting the Petition	2
Enforcement of the Federal Meat Inspection Act Will Not Be Impeded	2
A Divergence Between Circuits Has Not Been Accentuated	4
Conclusion	8
Certificate of Service	8

TABLE OF AUTHORITIES

Cases

	PAGE
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	6
Stern v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977)	3, 4, 5, 6, 7
White v. *Nicholls*, 11 L. Ed. 591, 3 How. 266 (1845)	5
Windsor v. *The Tennessean*, 719 F.2d 155 (6th Cir. 1983)	5,7

Statutes

5 United States Code, Sections 7503, 7513, 7701 & 7703	2
21 United States Code, Sections 675 and 676	2
42 United States Code, Section 1985(1)	1, 2, 4, 6

Other Authorities

Prosser & Keeton on Torts, Section 116 (5th Ed. 1984)	6
Restatement (Second) of Torts, Section 581A, Comment (a)	6

INTRODUCTION

In reviewing Shoultz's Petition for Writ of Certiorari, it is important to understand what is *not* before the Court. First, plaintiff has not brought before the Court any question concerning liability under 42 U.S.C. §1985(1) for allegedly harmful actions, other than communications. Second, the communications at issue are not alleged to have been false or defamatory, nor, by their very nature, could they be.

Although plaintiff Shoultz alleges that the Monfort defendants engaged in a "program to harass, annoy, persecute, injure, destroy and otherwise interfere with plaintiff's activities as an inspector" (Complaint, paragraph 9), the only specific acts of the Monfort defendants of which plaintiff complains are the mailing of a letter and the placing of a telephone call to plaintiff's superiors, demanding plaintiff's removal or reassignment. (Complaint, paragraph 11; Petition for Writ Certiorari, Statement of Facts.) The Complaint focuses on these communications; the hearing on defendants' Motions to Dismiss dealt solely with these communications; the opinion of the Tenth Circuit Court of Appeals deals solely with these communications; the "Question Presented" and Statement of Facts in plaintiff's Petition for Writ of Certiorari focus on these communications; and the discussion supporting plaintiff's "Reasons for Granting the Writ" deals solely with communications. Thus, any question concerning other activities which may give rise to liability under 42 U.S.C. §1985(1) is not before the Court.

Second, and more importantly, plaintiff has not alleged, either in the Complaint or in the Statement of Facts in his Petition for Writ of Certiorari, that the communications complained of were false. Although plaintiff alleges that the acts of the defendants were "willful and malicious" and made "in retaliation for his strict and lawful performance of his duties as an inspector" (Complaint, paragraph 12), plaintiff never alleges that the statements communicated to his superiors were false. In fact, the communications complained of, two

demands for plaintiff's removal from defendant's plant (Complaint, paragraph 11), are not susceptible to being either true or false. They are merely requests, in the nature of petitions for the redress of grievances. As such, and contrary to the manner in which plaintiff phrases the "Question Presented", the communications at issue can be neither false nor defamatory.

REASONS FOR NOT GRANTING THE PETITION

Plaintiff has asserted two reasons for issuing the writ: (1) the need to protect federal meat inspectors in the proper performance of their duties; and (2) a perceived divergence between the Sixth and Seventh Circuits over the scope of immunity provided by the First Amendment's right to petition the government for redress of grievances. Neither is applicable to the facts of this case.

Enforcement of the Federal Meat Inspection Act Will Not Be Impeded.

The Federal Meat Inspection Act provides severe criminal penalties for its violation. 21 U.S.C. §§675, 676. Violators can be fined up to $10,000 and imprisoned for up to three years. 21 U.S.C. §676. Persons who impede, intimidate or interfere with a federal official enforcing the Meat Inspection Act may be fined up to $10,000 and imprisoned for up to ten years. 21 U.S.C. §675. Such severe sanctions are sufficient to deter violations of the Meat Inspection Act and interference with its enforcement. There is, therefore, no need to create a civil remedy under 42 U.S.C. §1985(1) to ensure compliance with the Meat Inspection Act or protection for those who enforce it.

Further, federal meat inspectors, as all federal employees, are protected from wrongful discharge by the extensive due process requirements of the Federal Civil Service System. (*See, e.g.*, 5 U.S.C. §§7503, 7513, 7701 and 7703.) The District Court for the District of Colorado and the Tenth Circuit Court of Appeals recognized this in the instant case,

as did the Seventh Circuit in *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied* 434 U.S. 978. The officials being so protected, there is no reason to fear that an immunity for citizen requests to remove a federal meat inspector from office would unduly hamper enforcement of the Federal Meat Inspection Act. As stated by the Seventh Circuit Court of Appeals in *Stern* v. *United States Gypsum, Inc., supra*:

> . . . we note that when charges of misconduct are made through official channels, as was the case here, the protective machinery of due process hearings is available, with full opportunity to refute that which is unfounded.

547 F.2d at 1344.

Moreover, there is no allegation here, either in the Complaint or in the Statement of Facts in the Petition for Writ Certiorari, that the requests communicated to plaintiff's superiors were unfounded. There being no such allegation, there is no reason to construe the opinion of the Tenth Circuit Court of Appeals in the instant case as providing an immunity for false or unfounded allegations. The decision only recognizes an immunity for statements motivated by malice or ill will, but which of themselves can be neither true nor false.

The presence or absence of malicious motivation must have no bearing on the immunity afforded those who petition their government for redress of grievances. Obviously, those citizens most aggrieved will be most likely to petition for redress. Those citizens may also harbor a malicious desire to retaliate against or injure the offending federal agent. Nonetheless, as stated by the Seventh Circuit Court of Appeals in *Sterns, supra*:

> The possibility that a citizen who feels himself to have been abused by a particular federal official may take satisfaction when the official gets his perceived

> due is too human for First Amendment protection to depend on its absence.

547 F.2d at 1343.

A Divergence Between Circuits Has Not Been Accentuated.

Plaintiff contends that the instant decision of the Tenth Circuit exacerbates a split between the Sixth and Seventh Circuit Courts of Appeal over the extent of immunity to be afforded complaints to superiors of federal officials by the First Amendment's right to petition for redress of grievances. A careful review of these decisions, however, reveals that the instant case does not exacerbate that split and would not be an appropriate vehicle to explore the proper scope of this immunity.

In *Stern* v. *United States Gypsum, Inc., supra*, plaintiff, an IRS auditing agent, alleged that defendants communicated false complaints to his superiors, resulting in his discharge. Defendants contended that the communication of their complaints was a "classic exercise" of their First Amendment right to petition the government for redress of grievances. The Seventh Circuit Court of Appeals agreed with the defendants that the presentation of complaints about an auditing IRS agent's professional conduct to his superiors is a "classic example" of the right to petition, 547 F.2d at 1343, and held that:

> . . . a section 1985(1) complaint is insufficient to state an actionable federal claim insofar as it only alleges injury resulting from complaints about the plaintiff officer's official performance lodged by the defendants with the officer's superiors.

547 F.2d at 1344.

Recognizing that plaintiff had alleged that the complaints were false, the Seventh Circuit nonetheless held the communications privileged. The fear of litigation and the difficulty of proving truth, the court observed, would otherwise "chill" the exercise of an aggrieved citizen's right to

petition through overly cautious self-censorship. 547 F.2d at 1345. The court thus balanced the individual's interest in freedom from job interference against the public's interest in the uninhibited exercise of First Amendment freedoms and found in favor of the First Amendment.

The Sixth Circuit, however, disagreed with *Stern, supra*, in its treatment of allegedly false communications. In *Windsor* v. *The Tennessean*, 719 F.2d 155 (6th Cir. 1983), the plaintiff, a former United States attorney, sued a newspaper, its publisher and two employees for printing defamatory articles about the plaintiff, with knowledge of their falsity or reckless disregard for their truth or falsity. 719 F.2d at 160. The articles were allegedly used to convince plaintiff's superiors to terminate his employment. *Id.* Defendants asserted the immunity accorded the right to petition for redress of grievances. Relying strongly on *White* v. *Nicholls*, 11 L.Ed. 591 (3 How. 266) (1845), in which this Court held that false accusations communicated to a federal employee's superior by perons who knew the communication to be false would not be protected by the right to petition for redress of grievances, the Sixth Circuit held the privilege not applicable. It is important to note that in both *White* and *Windsor* the communications were alleged either to be false *(White)* or made with reckless disregard of their truth or falsity *(Windsor)*.

In contrast to *White* and *Windsor*, the plaintiff here has made no allegation that the allegedly offending communications were false or made with reckless disregard for their truth or falsity. Plaintiff merely claims that defendants will-

fully and maliciously* requested of plaintiff's superiors that he be removed from their plant. (Complaint, paragraph 11.) The facts of the present case thus fit *Stern* exactly, which rationale the Tenth Circuit found applicable. In both cases, citizens aggrieved by a federal officer's performance of his duties complained to his superiors and were successful in having him removed. Each was a "classic exercise" of the right to petition for redress of grievances. 547 F.2d at 1342. Further, to paraphrase *Stern*, plaintiff's Complaint here "makes it plain that the defendants genuinely sought governmental response to their charges" — they requested an employee to be removed and he was removed. 547 F.2d at 1345.

This Court having denied certiorari in *Stern* v. *United States Gypsum, Inc., supra*, there is no reason to grant it now. Moreover, the present case would be a much less appropriate vehicle for defining the outer limits of the privilege accorded petitions for the redress of grievances than was *Stern*, in which plaintiff had alleged that the communications

---

* It is important to note that plaintiff has not used the word "malicious" or "maliciously" in the *New York Times Co* v. *Sullivan*, 376 U.S. 254 (1964), sense of "malice" as possessing "knowledge that it was false or with reckless disregard for whether it was false or not." 376 U.S. at 279-280. Rather, it is apparent from even a cursory review of the Complaint that plaintiff uses "malicious" and "maliciously" in the sense of "with ill will" or "with intent to injure". (*See, e.g.*, Complaint, paragraph 12.)

In the law of defamation, however, an injurious motive alone is insufficient to give rise to liability. Rather, plaintiff must allege falsity. *See, e.g., Prosser and Keeton on Torts*, §116 (5th Ed. 1984); Restatement (2d) of Torts, §581A, comment a. To quote from the Restatement (2d) of Torts:

> There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him. (§581A, comment a.)

Certainly no lower standard should apply when First Amendment freedoms are at stake, simply because plaintiff invokes 42 U.S.C. §1985(1). *Cf. New York Times Co.* v. *Sullivan, supra*. Moreover, since the communications at issue are incapable of being either true or false, defendants could not possibly have made them with knowledge of their falsity.

were false. In the present case there is and can be no allegation of falsity. The communications at issue being incapable of truth or falsity, the instant case would be totally inappropriate for exploring the scope of immunity to be afforded false communications.

Further, the communications at issue being insusceptible of falsity, the reference in the instant opinion to the Seventh Circuit's observation that "this kind of redress-seeking" should not be curtailed "under any circumstances" constitutes dictum. *See* 547 F.2d at 1345. With this dictum excised, the instant opinion harmonizes, rather than conflicts, with *Windsor* v. *The Tennessean, supra*. Thus, although the fact pattern of the instant case squarely fits *Stern*, the absence of falsity places this case within the qualified immunity implicitly accepted in *Windsor*, and even the Sixth Circuit would have dismissed the Complaint herein. The instant case does not, therefore, exacerbate the divergence between the Sixth and Seventh Circuits, but rather harmonizes with the Sixth while quoting from the Seventh. It would, therefore, be an equally inappropriate vehicle for exploring the divergence between the Sixth and Seventh Circuits.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRUCE A. MENK
of HALL & EVANS
717 Seventeenth Street
Suite 2900
Denver, Colorado 80202
(303) 293-3500

GARY B. BLUM
of LONG & JAUDON, P.C.
1600 Ogden Street
Denver, Colorado 80202
(303) 832-1122

Attorneys for Respondents, Monfort of Colorado, Inc., Kenneth W. Monfort and Samuel D. Addoms

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were placed in the United States Mail, with proper postage, addressed to Irvin M. Kent, 1430 Havana Street, Aurora, Colorado 80010, Attorney for Petitioner, on the same day this Brief was deposited with Federal Express for delivery to the Clerk of this Court.

_____

Bruce A. Menk